No. 20146

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BRASWELL MOTOR FREIGHT LINES, INC.,

Appellant,

vs.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *et al.*,

Appellees.

OPENING BRIEF OF APPELLANT.

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OPENING BRIEF OF APPELLANT.

Statement as to Jurisdiction.

The action is brought by an employer, an interstate common carrier, against labor unions for a declaration of rights under a collective bargaining agreement between the parties. The United States District Court for the Southern District of California had jurisdiction by reason of Section 301(a) of the National Labor Relations Act, as amended (29 U.S.C. §185) and 28 U.S.C. §§ 2201-2202. The case is before the United States Court of Appeal for the Ninth Circuit on appeal from a judgment in favor of the defendant labor unions in the District Court [R. A. 312-313].[1] The

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[1] "R. A." designates the Record on Appeal and numerals indicate page references therein.

jurisdiction of the United States Court of Appeals arises by virtue of the provisions of 28 U.S.C. §§ 41, 1291 and 1294.

Statement of the Case.

1. Statement of the Manner in Which the Question Arises.

Appellant is a common carrier by motor vehicle in interstate commerce [R. A. 314-315]. Appellees are local unions affiliated with the Western Conference of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America [Teamsters].[2] [R. A. 316]. The sole question on appeal is whether the District Court has correctly declared the rights of the parties under a multi-employer collective bargaining agreement consisting of a "Western States Area Master Freight Agreement" [Master Agreement] and agreements supplementary thereto which were effective from July 1, 1961 through June 30, 1964.[3] The case is before the Court on an Agreed Statement of Facts [R. A. 74-199]. A brief summation of the undisputed facts will aid both in the statement and understanding of the questions of contract interpretation which are presented.

Appellant's operations are conducted between Los Angeles, California, and Dallas and Houston, Texas, and intermediate points of designated routes via El Paso, Texas [R. A. 315]. Since July 1, 1957, Appellant has controlled through stock ownership another common

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[2]Abbreviations to be used in the Brief are indicated in brackets following first use of the name or phrase to be abbreviated.

[3]The complete texts of the Master Agreement and supplements thereto are reproduced as Exhibits A through E of the Statement of Agreed Facts [R. A. 83-140]. All provisions thereof considered by Appellant to be pertinent to issues presented on the appeal are reproduced hereafter either in the text of the Brief or in Appendices.

carrier by motor vehicle known as Braswell Freight Lines, Inc. [Freight Lines] which operates between Fort Worth and Dallas, Texas, and designated points generally north and east thereof in Texas, Oklahoma, Tennessee, Mississippi and Louisiana [R. A. 315].

For several years Freight Lines and certain unions in the area served by Freight Lines affiliated with the Teamsters [Southern Locals] were parties to a multi-employer collective bargaining agreement which expired on January 31, 1961 [R. A. 316]. Neither Appellant nor any of the Appellees was party to that Agreement [R. A. 316].

For collective bargaining purposes, as well as others, the operations of Appellant are separated into an Eastern and Western Division. The Eastern Division includes all operations of Appellant east of El Paso to Dallas and Houston. The Western Division embraces operations El Paso and west [R. A. 315].

Employees on Appellant's Eastern Division are not covered by collective bargaining agreements with any union. During the period they were effective the Master Agreement and supplements covered employees on Appellant's Western Division engaged in the categories of work specified therein [R. A. 315]. Since January 31, 1961, Freight Lines and the Southern Locals have negotiated in an attempt to reach a new collective bargaining agreement covering Freight Lines employees, but no agreement has been reached [R. A. 316-317].

The Southern Locals went on strike against Freight Lines on April 23, 1962. Thereafter on April 28, 1962, the Southern Locals filed with the National Labor Relations Board [NLRB] a charge that Freight Lines, Appellant and J. V. Braswell, Appellant's principal stock-

holder, had engaged in unfair practices against said Southern Locals. A complaint was issued on these charges by the General Counsel for the NLRB on May 8, 1962, charging unfair labor practices by Freight Lines, J. V. Braswell and Appellant in violation of Section 8(a)(1) and (5) of the National Labor Relations Act [Act]. Said NLRB case (hereafter referred to as NLRB Case No. 16-CA-1648), continued pending and undecided at the date of submission of this action for decision.[4]

Articles 8 and 9 of the Master Agreement deal with "Grievance Machinery." Those sections are reproduced in their entirety in Appendix A, hereof, and the procedures therein established will be referred to herein for convenience as the "Grievance Machinery."

Article 9, Section 1 provides, among other things, as follows:

> "The Union and the Employers agree that there shall be no strike, lockout, tie-up or legal proceedings without first using all possible means of settlement, as provided for in this Agreement, of any controversy which might arise." (Appendix A, p. 3).

On June 11, 1962, and without first resorting to the Grievance Machinery, the Appellees called a strike against Appellant and established picket lines at terminals within Appellant's Western Division [R. A. 317]. The strike was called *solely as a protest against the alleged unfair labor practices of Appellant in its deal-*

[4]On July 30, 1965, the NLRB made findings on an order in NLRB Case No. 16-CA-1648, from which both the unions and employers involved appealed. Said appeals are now pending in the United States Court of Appeals.

ings with the Southern Locals which were the subject of NLRB Case No. 16-CA-1648 [R. A. 317]. Most of Appellant's employees on its Western Division who were covered by the Master Agreement joined the strike. Appellant thereupon employed others to perform the work theretofore performed by the strikers.

The strike continued without interruption from June 11, 1962 until April 1, 1963. During April, 1963, and after the strike had ended, the Appellees demanded that the strikers be allowed to return to work in positions to which they would have been entitled on a seniority basis had they continued to work during the strike period [R. A. 318]. It was Appellant's position in response to these demands that the strikers had been permanently and lawfully replaced and had ceased to be employees of Appellant [R. A. 318]. Appellant was at all times willing to accept the strikers for employment as new employees as positions became available [R. A. 318].

On April 30, 1963, each of the Appellee local unions filed a complaint with the Southern California Joint Area Committee established under Article 8 of the Master Agreement [Joint Area Committee] seeking a determination under the Grievance Machinery that Appellant had failed to assign work to the strikers in accordance with their seniority rights and that such failure was a violation of Articles 6 and 10 of the Master Agreement.[5]

Before any hearings were held under the Grievance Machinery the Appellant brought this action seeking a judicial declaration as to what extent, if at all, the

[5]Article 6 (Seniority) Section 1 and Article 10 (Protection of Rights) Section B-1, the specific portions of the Master Agreement mentioned in the complaints, are reproduced as Appendix B hereof.

Appellant is required to submit the questions necessarily involved in deciding the relative seniority rights of the strikers and their replacements for consideration under the Grievance Machinery. The contentions of Appellant on the issues of contract interpretation may be summarized as follows:

(A) The decision as to whether the refusal of Appellant to give the strikers seniority over their replacements necessarily involves a determination, (1) as to whether the strike by Appellees was a breach of the collective bargaining agreement, (2) as to whether the strike by Appellant's former employees was a protected activity under the National Labor Relations Act, and (3) as to whether the Appellant had in fact committed the claimed unfair labor practices against the Southern Locals.

(B) That Appellant is not bound to submit any of the three last mentioned issues (*i.e.,* strike as a breach of contract, strike as a protected activity, or claimed unfair labor practices toward third parties) for handling under the grievance procedures of the Master Agreement.

(C) That, assuming without admitting, some (or all) of the issues above set forth as necessary to the determination of seniority rights are appropriate for handling under grievance procedures the Appellees have waived such right by their own actions.

(D) That, assuming without admitting, the issues posed by the complaint fall within the scope of

grievance procedures and consideration thereof has not been waived no action can be taken under grievance procedures until the NLRB has finally decided whether Appellant did in fact commit the claimed unfair labor practices against third parties which it was the purpose of the strike to protest.

(E) That, in any event, Appellant cannot be required to submit to grievance procedures as requested by Appellees because such procedures do not result in a binding and enforceable arbitration award.

After briefs and oral argument the case was submitted for decision by the District Court on the Statement of Agreed Facts. The District Court's interpretation of Articles 8 and 9 of the Master Agreement in relation to the agreed facts appears in the portion of its Findings of Fact and Conclusions of Law designated as the Conclusions of Law [R. A. 322]. For convenience of reference these "Conclusions of Law" are reproduced in their entirety as Appendix C hereof.[6]

The District Court concluded (contrary to Appellant's contentions) that: (1) if a dispute is one subject

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[6]In a "Memorandum Opinion for Use In Preparation of Findings of Fact, Conclusions of Law and Judgment," [R. A. 273-282], the District Court set forth its conclusions on some, but not all, of the issues presented in the action. Appellant interposed objections to the proposed findings of fact, conclusions of law and judgment submitted by counsel for Appellees [R. A. 283-289]. The findings of fact and conclusions of law signed and filed are those directed by the District Court after a hearing of the objections and Appellant's proposed counter findings of fact, conclusions of laws and judgment [R. A. 312-320].

to grievance resort thereto is mandatory; (2) the dispute as to whether the strike breached the contract is such a dispute; and (3) the benefits of Article 9 (grievance procedure) were not withdrawn as to disputes stemming from the strike because Appellee had taken strike action without first resorting to grievance to receive the same results they sought to accomplish through the strike [R. A. 320-321].

However, the District Court also concluded (supporting Appellant's contentions) that Appellant is not bound to submit for determination through grievance procedures either (1) the question as to whether its former employees were engaged in a protected activity under the National Labor Relations Act when they joined the strike to protest Appellant's alleged unfair labor practices toward the Southern Locals, or (2) the question as to whether Appellants had committed unfair labor practices against the Southern Locals.

The District Court refused to determine whether an award under Grievance Machinery is binding and enforceable on the basis that such determination is not required.

Notwithstanding its conclusion that there are disputes created by the complaints which are not subject to determination under grievance procedures, the District Court has held, both in its conclusions of law and the judgment, that the complaints are subject to determination under the Grievance Machinery and has ordered the action dismissed on the merits [R. A. 312, 321].

2. The Questions Involved.

The basic question on appeal is whether the District Court has correctly interpreted and applied Articles 8 and 9 of the Master Agreement as they relate to the agreed facts. More specifically the questions here presented are these:

1. Is Appellant bound to submit to determination through the grievance procedure the question as to whether the strike of the Appellees called on June 11, 1962, breached the Master Agreement?

2. Were the benefits of the Grievance Machinery, otherwise available, withdrawn as to disputes arising out of the strike when the Appellees elected to strike without first processing their complaint, which was the subject of the strike, through Grievance Machinery?

3. Are the conclusions of the District Court, to the effect that the complaints and the dispute as to whether the strike was a breach of contract must be determined through grievance procedures, fatally inconsistent with the conclusions of the District Court to the effect that Appellant is not bound to submit to grievance determination the questions as to whether the strikers were engaged in a protected activity and whether appellant had in fact committed unfair labor practices?

4. Is the use of Grievance Machinery mandatory if the dispute is one which can be referred thereto?

5. Was the District Court obligated to decide whether the grievance procedure results in an award which is binding and enforceable on the parties?

Specification of Errors.

The judgment of the District Court in favor of Appellees should be reversed because the District Court has committed the following errors, each of which constitutes legal basis for such reversal:

1. The following findings and conclusions contained in the following Conclusions of Law are inherently unreasonable and in direct conflict with the plain language of the collective bargaining agreement:

(a) The finding and conclusion contained in Conclusion of Law 6(b) to the effect the Appellant is bound to submit the question of whether the strike was a breach of the Master Agreement for determination through grievance procedures. (Appendix C, p. 8).

(b) The finding and conclusion contained in Conclusion of Law 6(f) to the effect that the benefits of Grievance Machinery have not been withdrawn as to disputes arising out of the strike because Appellees went on strike without first resorting to Grievance Machinery. (Appendix C, p. 9).

(c) The findings and conclusions contained in Conclusion of Law 9 to the effect that the complaints filed April 30, 1963 are subject to determination under the Grievance Machinery (Appendix C, p. 9).

(d) The finding and conclusion contained in Conclusion of Law 10 that Appellant is not entitled to a judgment. (Appendix C, p. 9).

2. The findings and conclusions contained in Conclusions of Law 9 and 10 to the effect that the complaints of Appellees are subject to Grievance Machinery determination and that Appellant is not entitled to judgment are directly contrary to and cannot be reconciled with the findings and conclusions in Conclusions of Law 6(c), 6(d) and 6(e) to the effect that Appellants are not bound to submit for determination through Grievance Machinery certain disputes which must necessarily be resolved before a determination of the complaints is possible.

3. The findings and conclusions contained in the following Conclusions of Law are in direct conflict with the plain language of the collective bargaining agreement and, inherently unreasonable and are contrary to law:

(a) The finding and conclusion contained in Conclusion of Law 6(a) to the effect that resort to Grievance Machinery is mandatory if the dispute is one which the parties have agreed to submit to determination under grievance procedures in the Master Agreement and supplements thereto. (Appendix C, p. 8).

(b) The finding and conclusion contained in Conclusion of Law 7 to the effect that a determination as to whether an award under the Grievance Machinery is binding and enforceable is not necessary in this action. (Appendix C, p. 9).

ARGUMENT.

1. There Are Certain Principles of Law and Essential Facts Common to All of the Issues Raised on the Appeal.

Summary of the Argument.

Because all issues on the appeal involve interpretation of a written instrument as applied to agreed facts, the Court of Appeals is free to draw its own conclusions as to the meaning of the language involved. The case is one of first impression and is governed by federal law. The Grievance Machinery does not result in final determination of any dispute but it does operate to nullify the "no-strike" pledge. Therefore, rules of interpretation of agreements containing provision for binding arbitration which operates to strengthen and enforce a "no-strike" pledge are not appropriate for determination of the present controversies. The crucial disputes are whether the strikers were engaged in activities protected under Section 7, and the Appellant had committed acts in violation of Section 8(a)(1) and (3) of the Act. It is the policy of the Act that disputes under these sections be resolved by the NLRB and the Courts. That policy must be given effect in the interpretation and application of the Grievance Machinery provisions of the Master Agreement.

The action arises under Section 301(a) of the National Labor Relations Act and is governed by federal law.

Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 1 L. ed. 2d 972, 77 S. Ct. 912 (1957);

Atkinson v. Sinclair Refining Co., 370 U.S. 238, 8 L. ed. 2d 462, 82 S. Ct. 1318 (1962).

The relief sought is a judicial determination as to what disputes, if any, presented under the agreed facts the Appellant is bound to submit for consideration under the grievance procedures set up in Articles 8 and 9 of the Master Agreement. No question of ambiguity or bargaining history requiring extrinsic evidence in aid of interpretation is presented. The Court of Appeals is, therefore, free to draw its own conclusions as to the meaning and intent of the contract language and is not bound by those drawn by the trial court.

Pacific Portland Cement Co. v. Food Machinery & Chemical Corp., 178 F. 2d 541, 548 (CA-9, 1949);

Smyth v. Barneson, 181 F. 2d 143, 144 (CA-9, 1950);

American Eagle Fire Ins. Co. v. Eagle Star Ins. Co., 216 F. 2d 176, 179 (CA-9, 1954);

Kostelac v. United States, 247 F. 2d 723, 726 (CA-9, 1957).

There have been a number of decisions of the United States Supreme Court dealing with the question of the rules of interpretation to be applied as to the scope and effect of provisions in collective bargaining agreements providing for arbitration resulting in a final and binding award.

See:

United Steelworkers v. Warrior Gulf & Navigation Co., 363 U.S. 574, 4 L. ed. 2d 1409, 80 S. Ct. 1347 (1960);

United Steelworkers v. Enterprise Wheel & Car Corporation, 363 U.S. 593, 4 L. ed. 2d 1424, 80 S. Ct. 1358 (1960);

United Steelworkers v. American Manufacturing Company, 363 U.S. 564, 4 L. ed. 2d 1403, 80 S. Ct. 1343 (1960);

Drake Bakeries Inc. v. Local 50, 370 U.S. 254, 8 L. ed. 2d 474, 82 S. Ct. 1346 (1962);

The rules of interpretation evolved in these cases are based upon the premise that a "final determination" of grievances over the application and interpretation of a collective bargaining agreement by a "method of settlement" agreed upon by the parties conforms to the policies of the Act (29 U.S.C. 173(d)), furthers labor peace and encourages a higher responsibility of the parties.

There is, however, a fundamental difference between the above-cited and like cases and the one here presented. The Grievance Machinery set up in the Master Agreement does not result in a determination of any dispute which is binding upon the parties. As will be demonstrated more fully in subsequent parts of the Argument, the only expressly agreed result of non-compliance with a grievance procedure decision is the withdrawal of the benefits of the "no-strike" provisions of the contract.

This appears to be the first case in which the courts have been called upon to decide what, if any, status an inconclusive grievance procedure should have in the plan established under the National Labor Relations Act for resolving labor disputes. Because of the fundamental differences in the scope and effect of the contract provisions involved the reasoning which underlies *Warrior* and other similar cases is not here applicable. The issues of contract interpretation must there

fore be resolved on the basis of the relationship of the aims and purposes of the Act.

The District Court apparently did not understand fully the true character of the disputes which Appellees propose should be resolved through grievance procedures. The result is inconsistent and conflicting conclusions.

The immediate subject of the grievance complaint is, of course, the relative seniority of the strikers and their replacements. The essence of the controversy, however, is the interpretation and application of Section 7 and of Sections 8(a)(1) and (5) of the Act.

It has been agreed for purposes of this action that the sole purpose of the strike was to protest violations of Section 8(a)(1) and (5) allegedly committed by Appellant, its principal stockholder and its wholly owned subsidiary toward the Southern Locals. Appellee's sole justification for the strike in face of a "no-strike" provision in the contract is that Appellant's employees who joined the strike were engaging in an activity protected under Section 7 of the Act. If it is ultimately determined the Appellant did not commit unfair labor practices, the strikers are not entitled to reinstatement.

NLRB v. McCatron, 216 F. 2d 212 (CA-9, 1954);

NLRB v. Rives Co., 288 F. 2d 511 (CA-5, 1961);

NLRB v. United Brass Workers, 287 F. 2d 689 (CA-4, 1961).

Even if it is determined that unfair labor practices were committed against the Southern Locals, protest of such conduct by employees on the Western Division may not qualify as a protected activity under Section 7

of the Act. If it does not, the strike of such Western Division employees and Appellees constitutes a violation of the "No-strike" clause of the bargaining agreement and the strikers would not be entitled to reinstatement.

See:

NLRB v. Kaiser Aluminum Co., 217 F. 2d 366 (CA-9, 1954);

Electrical Workers, Local 1113, v. NLRB, 223 F. 2d 338 (CA-DC, 1955).

The Supreme Court has held repeatedly that the NLRB must decide whether conduct constitutes a protected activity under Section 7 or proscribed conduct under Section 8 of the Act. See, for example:

San Diego Building Trades Council v. Garmon, 359 U.S. 236, 3 L. ed. 2d 775, 79 S. Ct. 773 (1959);

Weber v. Anheuser-Busch, 348 U.S. 468, 99 L. ed. 546, 75 S. Ct. 480 (1955).

Determination of the disputes as to legal status of the parties under Section 7 and Section 8(a)(1) and (5) of the Act will solve the question of seniority rights as a matter of law. Therefore, the proper relationship of procedures provided under the Act for solution of these disputes by the NLRB and the right and duty of the parties to delegate such determination for consideration through Grievance Machinery are necessarily involved in each of the specific issues raised before this Court on the Appeal.

2. The Finding and Conclusion of the District Court That the Question as to Whether the Strike Against Appellant Which Began June 11, 1962, Was a Breach of the Master Agreement Must Be Determined Through Grievance Machinery Is Clearly Erroneous.

Summary of the Argument.

The concluding sentence of Article 9, Section 1 expressly reserves to the employees the right to legal proceedings when a strike is in violation of the Agreement. When read in context with other provisions, it is clear the purpose of this concluding sentence is to exempt employers from their general "no legal proceedings" pledge when the Unions have flaunted their obligation to abide by grievance procedures by a strike in the face of their no strike agreement. Further, on the facts here involved, propriety of the strike depends entirely upon whether the strikers are engaged in an activity protected under Section 7 of the Act. The issue of the propriety to strike is, therefore, one arising under the National Labor Relations Act and not a controversy arising under the Master Agreement within the meaning of Articles 8 and 9 thereof. The conclusion the strike issue must be submitted for grievance handling conflicts with legally sound conclusions of the District Court that the question of whether conduct is protected under Section 7 of the Act or proscribed under Section 8 thereof are beyond the scope of grievance procedure determination.

2.1 Preliminary Statement.

In the pleadings and on briefs before the District Court, the Appellant urged the grievance proceedings instituted by Appellees necessarily involve a determination as to whether the strike which began June 11, 1962, was a violation of the Master Agreement and that Appellant is not bound to submit the question of whether the strike was a violation of the agreement to determination through grievance machinery. The Memorandum Opinion prepared by the District Court for use in preparation of proposed findings of fact, conclusions of law and judgment contains no discussion of this issue. However, in its formal findings and conclusions, the District Court has held the Appellant was bound to submit to determination through grievance machinery the question as to whether the strike which began on June 11, 1962, constituted a breach of the Master Agreement [Conclusion of Law 6(b), R. A. 320-321]. Such finding and conclusion is contrary to the plain language of the agreement and inherently unreasonable.

2.2 The Issue as to Whether a Strike Is a Violation of the Master Agreement Is One Which Has Been Expressly Excluded From Consideration Under Grievance Procedure.

Article 9 of the Master Agreement deals with the subject of Grievance Machinery. The opening paragraph of Section 1 of that Article reads as follows:

> "The Union and the Employers agree that there shall be no strike, lockout, tie-up or legal proceedings without first using all possible means of settlement, as provided for in this Agreement, of any controversy which might arise. Disputes shall be

taken up between the Employer and the Local Union involved. Failing adjustment by these parties, the following procedures shall apply:" (Appendix A, p. 3).

In subsections (a) through (g) of Section 1 the parties then set forth the procedure applicable for consideration of a referable controversy (Appendix A, pp. 4-5). As to any particular controversy the grievance procedure therein described ends either in a deadlock or in a decision for or against one of the parties.

Article 9, Section 1(h) provides, among other things, that failure of a party to comply with a final decision withdraws the benefits of Article 9.[7]

Article 9, Section 1(i), the provision having particular pertinence to the present discussion, provides as follows:

> "(i) In the event of strikes, work stoppages, or other activities which are permitted in case of deadlock, default or failure to comply with majority decisions, no interpretation of this Agreement by any tribunal shall be binding upon the Union or affect the legality or lawfulness of the strike unless the Union stipulates to be bound by such interpretation, it being the intention of the parties to resolve all questions of interpretation by mutual agreement. *Nothing herein shall prevent legal proceedings by the Employer where the strike is in violation of this Agreement.*" (Emphasis added).

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[7]One of the issues on appeal is the propriety of the District Court's interpretation of certain portions of Article 9, Section 1(h). This issue is considered in Point 3 of the Argument, *infra*.

Two interpretations of the second sentence of Article 9, Section 1(i) are possible.[8] One interpretation is that the language refers to subsection (i) only. The other is that the sentence creates an exemption to Article 9, Section 1 in its entirety.

The first interpretation must be rejected because under such interpretation the considered language serves no purpose not already achieved by other provisions of Section 1. The undertaking of an employer contained in the opening sentence of Section 1 is to refrain from legal proceedings only until such time as grievance procedures have been concluded. That state has been reached when there is a decision or a deadlock. Therefore, under the language of the first sentence of Section 1 and without regard to the language in subsection (i), the employer is free to take legal proceedings of any kind including one where the strike is in violation of the agreement. Under the provisions of Article 9, Section 1(h), failure of a party to comply with any final decision withdraws the benefits of Article 9 (Appendix A, p. 5). Thus, if the union were the defaulting party it would have no rights under the first sentence of subsection (i). If the employer were the defaulting party, the benefits of the second sentence of subsection (i) would be lost. Since the first sentence of Section 1 and subsection (h), read together, accomplish all of the purposes which would be achieved by

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[8]At first reading it might appear the phrase "the strike" is intended as a reference to a post-grievance strike only. So interpreted the necessary result is that an Employer could institute legal proceedings but the Unions would not be bound thereby and the strikes which could be penalized as a violation of the Agreement would be those the Union consented to so designate. So patently improbable an interpretation is not considered "possible" in the sense the term is here used.

the concluding sentence of subsection (i) if it is read as having reference to other portions thereof only, such restrictive interpretation cannot be justified.

On the other hand, if the concluding sentence of Article 9, Section 1(i) is interpreted as a reference to Section 1 in its entirety, the language serves a most important and useful purpose. The "no-strike" clause is undoubtedly one of the major inducements of the collective bargaining agreement so far as the employer is concerned. The most effective guarantee the employer has that the "no-strike" clause will serve its intended purpose is the threat that legal proceedings by the employer will follow if it is violated.

As pointed out elsewhere in the argument in greater detail, Grievance Machinery does not result in a binding and judicially enforceable determination. Because of the very character of the dispute, the personal loyalties of those entrusted with the power of determination and the inconclusive character of any determination reached under grievance procedures, the possibility that a decision as to whether a strike in the face of a "no-strike" clause violates the agreement will resolve the controversy is virtually nil. The controversy arises only because the union has allegedly by-passed its obligation under Article 9. If the employer were required to resort to grievance procedure to test the legality of the strike before taking legal action while the union was striking to enforce its will in a controversy which should have been, but was not, submitted to grievance the purposes of labor peace and sanctity of agreements sought under the Act would be frustrated completely. The provision that an employer is free to resort to legal action where a strike is in violation of the agreement appears in the

end of Article 9, Section 1. Its location is itself some indication that it has reference to Section 1 in its entirety. So read the concluding sentence in Section 1 serves to make it clear beyond question that nothing which precedes it shall prevent legal proceedings by the employer at any time if a union strikes in violation of the agreement.

In logic the same result follows even if the concluding sentence of subsection (i) were to be interpreted as having reference to that section only. It is wholly illogical to suppose that the employer would take the trouble to require the inclusion in the agreement of an express provision preserving its right to take legal action in the event of a strike in violation of the agreement and then voluntarily frustrate this purpose by agreeing to submit the problem to the inconclusive and non-expert grievance procedure.

Thus, the concluding sentence of subsection (i) must be read either as controlling or persuasive that the parties did not intend that the question as to whether a strike violates the agreement is to be submitted for determination through Grievance Machinery.

Read as a reference to Section 1 in its entirety, the concluding sentence of subsection (i) serves to make it clear beyond question that nothing in Section 1 shall prevent legal proceedings by the employer at any time if a union strikes in violation of the agreement. Under this interpretation legal proceedings to determine whether a strike is in violation of the agreement are expressly excluded from those the employer has agreed to defer in the opening sentence of Section 1. The interpretation of the District Court is therefore wholly untenable when Article 9, Section 1 is considered in its entirety.

2.3 If the Master Agreement and Supplements Are Considered in Their Entirety It Is Clear Appellant Is Not Bound to Submit the Issue of the Validity of the Strike Under the Agreed Facts for Consideration Through Grievance.

Read without reference to other provisions of the agreement, the opening sentence of Article 9, Section 1 appears to require that any controversy which might arise between the parties must be processed through grievances. However, if other pertinent provisions of the agreement are examined it is apparent the issues to be referred to grievance are actually quite limited. For example, in Article 5, Sections 15-17 of the Over-The-Road Supplementary Agreement [R. A. pp. 110-11], provision is made for the determination of certain controversies relating to owner-drivers through a binding arbitration procedure wholly unrelated to and different from Grievance Machinery.

Under Grievance Machinery the first step after direct negotiation is reference to a Joint Area Committee. Article 8, Section 1 of the Master Agreement limits the jurisdiction of Joint Area Committees to grievances involving local unions "arising under this agreement or agreements supplemental hereto." (Appendix A, p. 1). The intent of the parties that this language must be construed in a restricted sense is clearly demonstrated by the fact that they have provided in Article 9, Section 1(d) that "all matters pertaining to the interpretation of any of the provisions of this agreement" fall outside the scope of Joint Area Committee's consideration (Appendix A, p. 4). The limited scope of a Joint Area Committee's jurisdiction is further underlined by the fact that in numerous instances in the supple-

mental agreements the parties have considered it necessary to declare expressly that a particular controversy patently stemming from the fact that the parties have a collective bargaining agreement is to be considered as one "subject to be handled in accordance with the grievance procedures." [See: R. A. pp. 105, 110, 111, 112; R. A. p. 117; and R. A. p. 126].

In the present case the union called a strike during the term of the contract at a time when there was no pending dispute between the parties as to its meaning, interpretation or application.

The sole ground relied upon by Appellees as justification for the validity and legality of the strike is that under the rules announced by the Supreme Court in *Mastro Plastics Corporation v. NLRB,* 350 U.S. 270, 100 L. ed. 309, 76 S. Ct. 349 (1956) the Appellant's employees were exercising a right guaranteed to them by Section 7 of the Act and existing wholly apart from and notwithstanding their "no-strike" pleadge in the agreement. Therefore, the question as to whether the strike was in violation of the agreement presents an issue arising under the National Labor Relations Act and not one "arising under" the Master Agreement as that phrase is used in Article 8, Section 1. The question as to whether activities are protected under Section 7 of the Act is one which has been held to fall within the exclusive province of the NLRB.

See:

San Diego Building Trades Council v. Garmon, 359 U.S. 236, 3 L. ed. 2d 775, 79 S. Ct. 773 (1959).

Since the necessary effect of the holding of the District Court is to compel the parties to submit for determination through grievance an issue arising under Section 7 of the Act over which the NLRB has primary jurisdiction. The District Court's conclusion that the issue as to whether the strike was a violation of the Master Agreement is determinable under grievance is clearly erroneous.

2.4 The Conclusion of the District Court That Appellant Was Bound to Submit to Grievance Handling the Dispute as to the Propriety of the Strike Is in Direct Conflict With the Conclusions That Plaintiff Was Not Bound to Submit to Grievance the Questions Pertaining to Protected Activities Under Section 7 and Proscribed Activities Under Section 8(a)(1) and (5) of the Act.

As has been noted above, it is agreed for the purpose of this action that the strike was called for the sole purpose of protesting alleged unfair labor practices by the Appellant, its principal stockholders and its subsidiary against the Southern Locals. The sole justification for this strike in face of the "no-strike" clause in the contract is that such protest constituted a protected activity under Section 7 of the Act. Therefore, the question of whether the strike was a violation of the Agreement which the District Court says must be submitted for grievance handling necessarily involves a determination of whether the Appellant was in fact engaged in unfair labor practices in its dealings with Southern Locals, and if so, whether the employees in Appellant's Western Division were engaged in an activity protected under Section 7 when they struck solely in protest of

such practices. In its Conclusions of Law 6 (c) and (d), the District Court has held that Appellant was not bound to submit for grievance determination the question of whether its dealings in relation to the Southern Locals constituted an unfair labor practice. (Appendix C, p. 8). Further, in its Conclusions of Law 6 (e), the District Court has decided that the question of whether the Appellant's employees by their strike were engaged in a protected activity is one Appellant is not bound to submit for grievance determination. The conclusions that the question of whether activities are protected under Section 7 or proscribed under Section 8 fall outside the scope of grievance are clearly correct.

San Diego Building Trades Council v. Garmon, 359 U.S. 236, *supra.*

Since both of such determinations are essential to the determination of whether the strike was or was not in violation of the Agreement, the conclusion of the District Court in its Conclusion of Law 6 (b) is, therefore, clearly erroneous.

3. The Interpretation Placed Upon Article 9, Section 1(h) of the Master Agreement Is Both Inherently Unreasonable and in Direct Conflict With the Plain Language of the Agreement.

Summary of the Argument.

The phrase "to-submit . . . to grievance procedures" appears frequently in the bargaining agreement and in the context of the entire writing must be interpreted as a reference to the functions of setting grievance machinery in motion. As interpreted by the District Court the phrase serves no purpose not served by other words in Article 9, Sec-

tion 1 (h). The purpose of Article 9, Section 1 (h) is to provide a punishment for those who would frustrate the consideration of disputes under grievance machinery. Under the interpretation for which Appellant contends the sub-section is a powerful force to that end. Under the District Court's interpretation the subsection is, for all practical purposes, useless as a penalty provision. Assuming, *arguendo,* that the resort to grievance is mandatory and that the issue of the validity of the strike is a covered dispute, sub-section (h) must be construed as creating a bar to the right of the Unions to process the complaints which give rise to this action.

Appellees went on strike against Appellant at locations of its Western Division on June 11, 1962 [R. A. 317]. The Master Agreement containing a "no-strike" clause was then in force. It is admitted that there were then no disputes, outstanding grievances or unresolved controversies between the parties arising out of the Master Agreement [R. A. 5, 70-71]. The sole purpose of the strike was as a protest against claimed unfair labor practices of Appellant, its principal stockholder and its subsidiary against the Southern Locals [R. A. 317]. Appellees have at all times pertinent taken the position their strike does not violate their commitments under the Master Agreement because, so Appellees claim, the strikers were engaged in activities protected under Section 7 of the Act.

At the time the strike was called and continuously since there has been a controversy between the parties as to whether the strike violates the Master Agreement and as to whether the unfair labor practices charged by the Southern Locals were actually committed.

It is the position of Appellees and of the District Court that resort to Grievance Machinery is mandatory as to covered disputes and that the question as to whether a strike is in violation of the Master Agreement is such a covered dispute [R. A. 320-321].

Article 9, Section 1 (h) of the Master Agreement provides as follows:

> "(h) Failure of any Joint Committee to meet without fault of the complaining side, *refusal of either party to submit to or appear at the grievance procedure at uany stage,* or failure to comply with any final decision, *withdraws the benefits of Article 9.*" (Emphasis added).

Appellant, of course, denies that Grievance Machinery is mandatory, and takes the position the question of whether the strike was in violation of the agreement is not a covered dispute. It is, however, also Appellant's position that if Grievance Machinery is mandatory and either of the above mentioned disputes is covered thereby Appellees were bound to submit the question as to whether the strike for the purpose indicated would be a violation of the agreement before they struck and that their failure to do so withdraws from them the benefits of Article 9 as to all subsequent controversies arising out of the strike.

The District Court has concluded the phrase "to submit" found in Article 9, Section 1(h) is restricted to conduct that must follow once Grievance Machinery has been set in motion and that the benefits of Article 9 have, therefore, not been withdrawn [R. A. 321].

In the Memorandum Opinion, the District Court states as its reasons for this conclusion simply that such

interpretation appears to the Court to be "more reasonable" and that even if it be assumed the phrase is ambiguous doubts must be resolved in favor of coverage [R. T. 277]. (Citing *Desert Coca Cola Bottling Co. v. General Sales Drivers*, 335 F. 2d 198, at 200-201 (CA-9, 1964). As further support for its conclusion the District Court cites *Packing House Workers v. Needham*, 276 U.S. 247 at 248-253, and *Drake Bakeries, Inc. v. Bakery Workers*, 370 U.S. 254 for the proposition that a union's alleged breach of its promise not to strike did not relieve the employer of its duty to arbitrate [R. A. 277].

Each of the foregoing cases involved a contract containing provision for a binding and judicially enforceable arbitration award. As is noted more fully elsewhere in the Argument, the reasoning upon which the rules of interpretation formulated in such cases is predicated is not pertinent here.[9]

Each specific provision of the agreement must be considered in its context in the larger writing and in the circumstances in which it is written. (*Desert Coca Cola Bottling Co. v. General Sales Drivers, supra*). This the District Court did not do.

The language of Article 9, Section 1(h) here most immediately involved reads— ". . . refusal of either party *to submit to . . . grievance procedure at any stage* . . . withdraws the benefits of Article 9." (Emphasis added). At several places in the supplemental agreements the parties have indicated by express statement that a particular dispute is one to be handled as provided in Article 9, Section 1. Uniformly, they have expressed this intent by the statement that the controversy shall

[9]The discussion referred to appears in parts 1 and 4.

be "submitted" to the "grievance procedure." (See Statement of Agreed Facts, Ex. B, pp. 38-42 [R. A. 111-112]; Ex. C, p. 8 [R. A. 117]; Ex. D, pp. 4-5 [R. A. 126] and Ex. E, p. 11 [R. A. 134]).

Thus, if the bargaining agreement is considered in its entirety it is apparent the parties have used the word "submit" as a word of art meaning both "take to" and "acquiesce in." The term "grievance procedure" is also used as a word of art as a means of reference to all of the provisions of Article 8 and Article 9, Section 1 of the Master Agreement. It is apparent the terms are used in subsection (h) in the same sense as elsewhere in the agreement.

Since the terms "submit to", "appear at" and "failure to comply with" are all used in subsection (h) it must be presumed each is intended to have a different meaning. Each of said terms is quite commonly used as a word of legal art when reference is made to the powers and proceedings of a tribunal. So used, "submit" has a jurisdictional connotation. "Appear" is normally used in relation to presence. "Comply with" is used to mean obedience to action taken by the tribunal.

The District Court says "submit" refers only to conduct ". . . that must be followed once Grievance Machinery has been set in motion . . .". So interpreted the question is immediately posed as to how a person can "submit" to a grievance procedure "already set in motion" other than to "appear" at the proceedings and "comply with" the decisions reached. In the context in which it appears the term "submit" must be read as having reference to the act of starting the proceedings provided for in Article 9, Section 1(a) through (g) or it serves no useful purpose. So read, every word in sub-

section (h) has a distinct meaning both in the framework of the agreement and in its accepted legal sense. Such interpretation to be preferred over the one adopted by the District Court which results in redundancy.

The obvious purpose of Article 9, Section 1(h) is to force the parties to comply with Grievance Machinery. The necessary effect of the holding of the District Court is that a party may wilfully refuse to set Grievance Machinery in motion without penalty but that he will be penalized if he demonstrates a reluctance to go forward with the proceedings once they have been started (possibly by him). Such interpretation makes the penalty an innocuous one.

There is nothing in the Master Agreement to prevent grievance procedures from going forward even though a party refuses "to submit" thereto. If, in such situation, the proceedings result in a decision adverse to the refusing party, there are no benefits of Article 9 remaining to be "withdrawn" as to that dispute. If the decision is favorable to the refusing party and the losing party complies there are still no benefits in Article 9 to be "withdrawn." It is only if there has been a deadlock or if the other party fails to comply with a ruling favorable to the "refusing" party that any benefits could be lost. The loss in such situation is caused by a failure "to comply" and not by any failure to "submit."

If Article 9, Section 1(h) is read as Appellant contends is the true intent of the parties the subsection becomes a powerful weapon to induce the parties to resort to Grievance Machinery for consideration of covered disputes. So read the effect of the provision is that if a party takes strike or other action described in the "no-

strike" clause to enforce its will with respect to a dispute referable to grievance without first asking for a grievance determination he cannot thereafter require the other party to submit to grievance procedures as to any issue pertaining to or arising out of that controversy. As this case demonstrates, a strike called in violation of a "no-strike" clause has a direct and powerful impact on all relationships of the parties covered by their agreement. If a party knows before he takes unilateral action in avoidance of the "no-strike" clause that he will thereafter have no access to grievance as to any matter arising out of such unilateral conduct and that the other party is also freed of its restrictions the likelihood of such unilateral action will be materially reduced.

Packing House Workers v. Needham, 376 U.S. 247, *supra* and *Drake Bakeries, Inc. v. Bakery Workers,* 370 U.S. 254, *supra,* cited by the District Court, are both clearly distinguishable from the situation which is here presented.

In *Needham* the union, after a work-stoppage of employees in protest of an allegedly improper discharge of one of their number, sought to compel the employer to submit the issue of the discharge to a binding arbitration. The employer contended in defense that the breach of the "no-strike" clause terminated all obligations of the employer under the collective bargaining agreement. The Supreme Court held that under the language of the particular agreement involved the duty to arbitrate survived the breach of the "no-strike" clause. The contract in *Needham* apparently contained no express provision as to what effect an unauthorized strike would have upon the right or duty to arbitrate.

There is no contention here that the strike in violation of the "no-strike" clause terminated the agreement in its entirety. Here, unlike *Needham,* the contract does contain a provision providing specifically for at least one consequence of breach of the "no-strike" clause. Appellant seeks to enforce the agreement, including Article 9, Section 1(h) thereof.

In *Drake Bakeries, Inc. v. Bakery Workers,* 370 U.S. 254, *supra,* an employer contended a reduction in force which halted production on one day during a controversy over the legality of a holiday work schedule constituted a strike in violation of a "no-strike" clause and that the strike operated as a waiver by the union of its right to compel arbitration of the issue as to whether there had been a strike in violation of the agreement. The Supreme Court confirmed the duty to arbitrate noting its decision was predicated upon the particular situation before it, including the arbitration provisions of the contract which the Supreme Court characterized as ". . . broad language, indeed . . ." (*Drake Bakeries, Inc. v. Bakery Workers,* 370 U.S. 257, *supra*). Apropos of the question here under consideration the Supreme Court stated:

> "Moreover, in this case, under this contract, by agreeing to arbitrate all claims without excluding the case where the union struck over an arbitrable matter, the parties have negatived any intention to condition the duty to arbitrate upon the absence of strikes." (262, *supra*).

The precise distinguishing situation envisioned in *Drake Bakeries* is here presented in Article 9, Section 1(h). In the same article of the agreement in which the "no-strike" clause appears and the Grievance Ma-

chinery is established there is a provision that says the refusal to resort to such procedures withdraws all benefits of such procedure for that controversy. In short, the parties to the agreement here under consideration have conditioned the duty to submit to Grievance Machinery upon the absence of strikes.

The interpretation placed on Article 9, Section 1(h) by the District Court is wrong because it is unfair. Refusal of a party to participate in grievance procedures after they have been set in motion neither invalidates the proceedings nor prevents a decision binding upon the reluctant party. Nonetheless a party who refuses to participate in such proceedings after they have been set in motion is penalized by loss of benefits of Article 9. But a person who violates both his "no-strike" pledge and his duty to institute Grievance Machinery procedures if a controversy cannot be resolved by mutual agreement suffers no penalty of loss of rights whatsoever. As a matter of fact, if such party is careful to show up at any Grievance Machinery proceedings which might be set in motion by the other party with respect to the controversy his strike may be converted into a lawful post-grievance strike if the proceeding happens to deadlock, or is decided in his favor. An interpretation which is so inherently unreasonable cannot possibly be accurate.

The parties now find themselves before this Court because Appellant believes, and has at all times believed, that the procedures established in Articles 8 and 9 of the Master Agreement are not mandatory and, in any event, that the issue as to whether the strike is in violation of the agreement is not determinable under the

grievance procedures therein established. However, assuming for the argument Appellant's position is incorrect, the question arises as to whether the Union has brought itself within the prohibitions of Article 9, Section 1(h). The answer is that it has.

The position of the unions before, during and since the strike has been that the strike action was an activity protected under Section 7 of the Act and, therefore, by law an exception to the "no-strike" undertakings in Article 9. All of the facts necessary to determination as to whether a strike by Appellant's employees in protest of alleged unfair activities committed against the Southern Locals constitutes a violation of the Master Agreement which are available now were available before the strike was called. Article 9, Section 1(d) specifically provides that any party to the agreement may request an interpretation of the provisions of the agreement through grievance procedures therein provided *at any time.* From the interpretation which the District Court has placed upon the agreement a similar result could also be achieved through the procedures in Article 9, Section 1(a) (Appendix A, p. 3). Therefore, under the premise of the District Court that grievance procedures are mandatory as to covered disputes and that the issue of whether the strike violates the agreement in such a dispute the unions were bound to resort to grievance to determine whether their interpretation of the "no-strike" clause was valid. When they failed to do so and went on strike they evidenced a refusal "to submit . . . to grievance procedures" in the most positive way possible and thereby forfeited the benefits of Article 9.

4. If Resort to Grievance Is Mandatory Under the Agreement the Provision Therefor Is Void and Against the Public Policy of the National Labor Relations Act.

Summary of the Argument.

The judicial and administrative remedies provided for in the Act are necessary to preservation of labor peace and the sanctity of collective bargaining agreements which it is the primary purpose of the statute to achieve. True arbitration resulting in a judicially enforceable award also furthers the purpose of the Act. Since the policy of the law is to favor only those private means of settlement which result in a "final adjustment" inconclusive grievance procedures are not affected thereby. Any agreement forcing parties to resort to a grievance procedure which is inconclusive necessarily runs counter to the policies of the Act because prompt definitive settlement is frustrated and burdensome but ineffective extension of disputes is encouraged. The terms of the particular agreement here involved are such that grievance procedures necessarily destroy all contract protections with respect to the controversy and oust all tribunals of the power to make interpretations of the agreement which will be binding on the parties. Therefore, under the provisions here involved Grievance Machinery becomes simply a vehicle by which the parties can be relieved of contractual oblagations under their collective bargaining agreement and the unions can be freed from the restraining effect of binding judicial interpretations of such agreement. Since, if resort thereto is mandatory, the procedures serve no

ultimate purpose except to frustrate and defeat the purposes of the Act and destroy altogether any right to a definitive adjudication of disputes it must be held that the provisions are void as against the policies of the Act.

One of Appellant's primary contentions in this action is that Grievance Machinery decisions are not binding and judicially enforceable and that it would, therefore, be contrary to the purposes of the National Labor Relations Act to hold resort to grievance procedures is mandatory. On this issue the case is clearly one of first impression. The conclusions of the District Court do not resolve the question. Restatement of Appellant's position is, therefore, required.

The fundamental purpose of the National Labor Relations Act is to minimize strikes and promote industrial stabilization through collective bargaining agreements.

29 U.S.C.A. §151;

United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578, *supra.*

Section 301 of the Act authorizes judicial actions to interpret and enforce collective bargaining contracts. It is now firmly established that Section 301 establishes substantive rights under federal law and that "comprehensiveness is inherent in the process by which such law is to be formulated . . ."

Teamsters Union v. Lucas Flour Company, 369 U.S. 95, 103, 7 L. ed. 2d 593, 82 S. Ct. 571 (1962);

Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 1 L. ed. 2d 972, 77 S. Ct. 912 (1957).

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The scope of judicial power under Section 301 must not be limited more than is necessary.

> *Smith v. Evening News Association,* 371 U.S. 195, 199, 9 L. ed. 2d 246, 83 S. Ct. 267 (1962).

However, in Section 203 (d) it is also a stated policy of the Act that "final adjustment" by a method agreed upon by the parties is the desirable method for settlement of grievance disputes arising over the application or interpretation of collective bargaining agreements.

Therefore, in every case in which a collective bargaining agreement contains provisions for some extra-judicial consideration of disputes there is presented the problem of accommodating the policy of private settlement with the necessity for a comprehensive judicial power so as to best achieve the over-all purposes of the Act.

It is, of course, now well settled that if a collective bargaining agreement contains provisions for a true arbitration resulting in a binding and enforceable award submission thereto is mandatory as to an arbitrable dispute and that such agreements ae to be construed liberally in favor of coverage.

> *Drake Bakeries, Inc. v. Bakery Workers,* 370 U.S. 254, *supra.*

This, however, appears to the first case posing the questions:

(1) Whether parties to a bargaining agreement may lawfully bind themselves to resort to an inconclusive grievance procedure for consideration of disputes otherwise then justiciable by the Courts or the NLRB, or both, under the Act; and

(2) If so, whether such agreements are to be strictly or liberally construed as to the disputes covered.

The answers to these questions will have far reaching consequences. Their significance is emphasized by the fact that they arise in a fact situation in which the potentially referable controversy includes the questions as to whether a strike was in violation of a "no-strike" clause and the defense of its legality is that it was an activity protected under Section 7 of the Act.

With respect to these questions it is Appellant's position: (1) that the provisions of the present agreement are such that if the duty to resort to grievance is mandatory the obligation is void because it is inimical to the basic policies of the National Labor Relations Act, and (2) that, at the very least, the policies of that Act require a strict interpretation against coverage.

The Grievance Machinery does not result in an award which is judicially binding and enforceable. The rights of the parties after grievance are fixed in Article 9, Section 1 (i). Therein they have expressly agreed that all questions of agreement interpretation (except whether a strike violates the agreement) shall be resolved only by mutual agreement. No intepretation of the agreement by any tribunal is to be binding upon a union unless the union so stipulates. Article 9, Section 1 (a) does contain a statement that a decision of a Joint Area Committee is "final and binding." There is no comparable language with respect to proceedings before the Joint Western Committee or the Impartial Umpire.[10] If the quoted phrase in subsection (a) is

[10]In one of the supplemental agreements the parties have provided for arbitration (so named) in a special situation and

read in context with subsection (i), it is apparent the words are used to indicate the "self-help" and prohibition against judicial enforcement provisions of Sub-Section (1) become effective at once.

The rule of liberal interpretation of true arbitration provisions in favor of coverage is simply an implementation of the policy set forth in Section 203 (d) of the Act that "final adjustment" of grievances by agreed methods is desirable. The grievance procedure here does not result in a "final adjustment." The policy of the Act in Section 203(d) is, therefore, not here pertinent and should not be applied.

True arbitration strengthens the collective bargaining agreement and supplements the activities of the courts and other tribunals in achieving peaceful settlement of labor-management disputes. The ultimate effect of the Grievance Machinery under the present contract is to remove any considered controversy from the coverage of the agreement and to oust all tribunals of all power to make a binding interpretation of such agreement. Thus, the goals of Grievance Machinery are the direct opposite of the goals of a true arbitration. The same logic which induces liberal interpretation of true arbitration provisons in favor of coverage requires a strict interpretation against such coverage here.

Whether mandatory resort to an inconclusive grievance procedure is *per se* against the public policy of the

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have made an award under arbitration binding. They thus demonstrate knowledge of appropriate words and how to use them when true arbitration is intended [R. A. 110-111].

Act it is not necessary here to decide. However, the only cases Appellant has been able to discover touching on the subject suggest that such should be the rule.

In *Drivers Union v. Riss & Co.,* 372 U.S. 517, 9 L. ed. 2d 918, 83 S. Ct. 789, a teamster contract having provisions similar in many respects to those here presented was before the Court on review of an order of a District Court dismissing for want of jurisdiction an action under Section 301 seeking to compel compliance with a grievance procedure decision requiring reinstatement of a discharged employee. The judgment of the lower court was reversed and the case remanded for a determination by that court as to whether the grievance procedure resulted in a binding and enforceable award. However, in its opinion the Supreme Court did make the following observation:

> "Of course, if it should be decided after trial that the grievance award involved here is not final and binding under the collective bargaining agreement, no action under § 301 to enforce it will lie. Then, should petitioners seek to pursue the action as a § 301 suit for breach of contract, there may have to be considered questions unresolved by our prior decisions. We need not reach those questions here . . ." (*Drivers Union v. Riss & Co.,* 372 U.S. 517, 520, *supra.*

In *Wiley & Sons v. Livingston,* 376 U.S. 543, *supra,* the question was whether a true arbitration provision in a collective bargaining agreement was enforceable against a successor of the employer through merger

when the agreement did not contain express language to that effect. It was there held that because of the policy of law favoring true arbitration the agreement should be interpreted in favor of its coverage of a successor in interest of the contracting party. Apropos of the present situation the Supreme Court stated:

> "The duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty. Thus, just as an employer has no obligation to arbitrate issues which it has not agreed to arbitrate, so a fortiori, it cannot be compelled to arbitrate if an arbitration clause does not bind it at all." (*Wiley & Sons v. Livingston,* 376 U.S. 543, 547, *supra*).

The District Court construed the word "bind" as used in the foregoing language as a reference to the creation of a contractual relationship. Assuming, *arguendo,* the accuracy of this view, the principle expressed in said quotation continues to apply here. The reason for compelling parties to resort to a true arbitration to the exclusion of judicial remedies in the Act is the policy of the law in favor of private settlements and the over-all final adjustment of disputes which is thereby achieved. If a decision in a grievance proceeding is made unenforceable by the express terms of the bargaining contract the effect, in terms of the purposes to be achieved under the Act, is the same as though there had been no agreement at all.

Since the present case was decided by the District Court there has been one Court of Appeals decision

which bears upon the question here under consideration. In *Allied Oil Workers Union v. Ethyl Corporation,* 341 F. 2d 47 (CA-5, 1965) the agreement provided for a mandatory grievance procedure not resulting in an enforceable decision and for true arbitration thereafter if the parties consented thereto on an *ad hoc* basis. The employer had made certain classifications of work and had apparently refused to participate either in the grievance procedures instituted by the union or to consent to arbitration thereafter. The unions sought declaratory relief under Section 301 which the employer opposed on the grounds (1) that the effect of the action was to compel arbitration in violation of the agreement, (2) that the remedy of the union was self-help, and (3) that the employer was right on the merits of the controversy. The District Court accepted the first two contentions and rejected the third. The Court of Appeals reversed the lower court on the first two issues and held the Courts cannot be ousted of jurisdiction and the parties relegated to the remedy of self-help by an inconclusive grievance procedure provision. The trial court was, however, sustained on the third issue. The effect is a determination that *de novo* judicial determination of a dispute appropriate for consideration under the inconclusive grievance procedures is authorized by law.

With respect to the problem of accommodating the inconclusive grievance procedure to the purposes of the Act the Court stated as follows:

> "It is true, and we recognize, that this case is somewhat different from the usual case under Section 301, in that the contract here involved contains only a permissive arbitration clause. Yet it is

> in a case such as this that we find Section 301 to have its most salutary effect, namely, the avoidance of industrial conflict by providing the parties to an honest dispute over the interpretation of their contract with a peaceful alternative to economic disruption." (*Allied Oil Workers Union v. Ethyl Corporation,* 341 F. 2d 47, *supra*).

Appellant submits the necessary effect of the holding in *Allied Oil Workers* is that the policies of the Act preclude mandatory referral of controversies to inconclusive grievance procedures to the exclusion of concurrent resort to judicial and other tribunals capable of a definitive answer to the dispute.

In this case, as in any other involving contract interpretation, the primary question is the operation and effect of the specific agreement involved. Whatever may be the rule in any other case, it must follow that the particular provisions here involved are against public policy, and, therefore, void if they do indeed make resort to Grievance Machinery mandatory.

As was spelled out in some detail in *Warrior,* the policy of the Act is to promote industrial stabilization through the collective bargaining agreement. A binding arbitration substitutes a rule-by-law for the temporary resolution of controversies dependent solely upon the relative strength, at any given moment, of the contending forces.

Under the provisions of Article 9, Section 1(i) the effecting procedures (whether they end in a "no-decision" deadlock or a refusal of a party to comply) is that the controversy involved is removed entirely from the protections of the collective bargaining agreement

and must thereafter be resolved, if it is resolved at all, by the "mutual agreement" which is the result of the "relative strength of the contending forces." Since the Grievance Machinery provision runs directly counter to the policies of the Act of avoiding strikes and encouraging the final adjustment of differences through agreement it must necessarily be against public policy if it is deemed to be mandatory.

If the resort to grievance procedures here provided is mandatory, the effect upon the adjudicative processes carefully set up and preserved in the Act as necessary to accomplish its purposes is devastating. Under Article 9, Section 1(i), if a union can induce deadlock at any stage in the proceedings (a very real possibility because of the qualifications for committee membership) all powers of the federal courts, of the NLRB and of any other tribunal which might otherwise have jurisdiction to make an interpretation of the agreement binding on the union are destroyed.[11]

Theoretically, inconclusive grievance procedures can serve as a deterrent to disruptive and ill-considered unilateral action. This consequence would undoubtedly follow in some measure if, as to any given controversy, the parties are in agreement that such procedures be used. In such circumstances the parties approach their dispute in the mood of peaceful disposition so that an advisory opinion can serve a useful purpose.

However, when it is necessary to force a party to go to grievance which he knows in advance can be stultified by deadlock of a Committee composed equally of union and employer representatives the usefulness of the

[11]The sole exception being a controversy as to whether a strike is in violation of the agreement.

procedure as a vehicle of labor peace is minimal. This is especially true since one of the necessary results of deadlock is a release of the parties from their "no-strike" pledge and the union from judicial evaluation of its position.

The basic evil of the contract provisions here under consideration is that they are so drawn and designed that the parties, the unions particularly, are in better position, if they really want to fight, if they go through grievance than if they do not. Simply by forcing an issue to grievance and then inducing a deadlock the union is at once released of its "no-strike" pledge and of the possibility that any tribunal can effectively defeat the construction which the union chooses to place upon the agreement. Thus, settlement by force, which the Act seeks to eliminate, is fostered.

The conclusion of the District Court has been made without consideration of any of the above described major problems of policy under the Act which follow necessarily as a consequence. Its decision is further unsound because the District Court has failed to recognize that a determination as to whether the Grievance Machinery results in a binding award is vital. Only by such determination can the policy of interpretation of entire agreement be fixed and its legality determined.

As earlier stated, the case presents an issue of first impression. The problems which it poses have been recognized but a decision thereof deliberately deferred in earlier Supreme Court cases. The one Court of Appeals decision which has some pertinence supports the position for which Appellant here contends. The determination of the District Court that resort to griev-

ance procedure is mandatory even though such procedure may be inconclusive should be reversed on the basis of the language of the contract and public policy under the Act.

5. **There Are Fatal Inconsistencies in the Conclusions and Judgment Which Preclude a Clear Understanding of the Basis of Decision and Make Necessary an Affirmative Declaration of the Rights of the Parties by the Court of Appeals.**

Summary of the Argument.

Whether the strike was in violation of the contract and the strikers have seniority depends upon whether the strike was a protected activity under Section 7 of the Act and whether the Appellant did in fact commit unfair labor practices. The conclusions that the disputes of legality of the strike and seniority must be submitted for grievance determination but that Appellant is not bound to submit to grievance the questions necessary for such required determinations are fatally inconsistent. Further, the District Court has made findings in favor of Appellant on certain of the issues presented but has adjudged the action be dismissed. Because the case involves only the question of interpretation of a written instrument as applied to agreed facts it is proper for the Court of Appeals finally to resolve all issues in the action. It should do so.

The action is brought for clarification of the rights of the parties under the Grievance Machinery provisions of their agreement in relation to certain pending and undetermined disputes. Because of the conflicting conclu-

sions of the District Court the parties find themselves at the end of the litigation with their disputes as to the contract's meaning for practical purposes, still unresolved.

The problem of the legality of the provisions if resort to grievance is mandatory has not been considered. The District Court has decided "the complaints" filed April 30, 1963 are subject to determination through Grievance Machinery [R. A. 321]. The judgment declared the "disputes" (without limitation) which have arisen between the parties are subject to grievance. The conclusion and judgment are for outright dismissal of the action. However, the District Court has also concluded Appellant is not bound to submit for determination under grievance procedures either the question as to whether the strike action was a protected activity under Section 7 of the Act or the question as to whether Appellant did in fact engage in unfair labor practices in its dealings with the Southern Locals.

The parties contending for seniority in the disputes which give rise to this action are the strikers and their replacements. In *Mastro Plastics Corp. v. NLRB,* 350 U.S. 270, *supra,* it was held that a strike by employees against flagrantly unfair labor practices committed directly against them by their employer was an exercise of a protected activity under Section 7 of the Act and that under the terms of the particular agreement the "no-strike" clause could not reasonably be construed as a voluntary waiver of that statutory right. Appellee's sole justification for the strike action here taken is that the strike in protest of claimed unfair labor pracices of Appellant against the Southern Locals is a protected activity and proper notwithstanding the "no-strike"

clause in the contract under the holding of *Mastro Plastics.*

Until such time as it is determined whether the strike was or was not a protected activity under the Act and whether the Appellant did ot did not commit unfair labor practices toward the Southern Locals, the facts essential to a decision of the question of the legality of the strike, and, therefore, of seniority rights are not at hand.

The necessary effect of the holding of the District Court is, therefore, that Appellant is not bound to submit to determination through grievance the issues upon which the issues of strike legality and seniority depend but that it is lawfully bound to go forward with a determination of the legality-of-strike and seniority issues nonetheless.

In cases arising under Section 301 of the Act involving situations similar to that here presented the Courts have frequently stayed action pending further developments under the agreements of the parties after judicial determination.

> *Drake Bakeries v. Bakery Workers,* 370 U.S. 254, *supra.*

Here the court simply dismissed the action notwithstanding the fact that certain of its conclusions were in Appellant's favor.

As a result of the conflicts in the conclusions reached and the manner in which the District Court has disposed of the case the problem as to procedure on the complaints under the Grievance Machinery still remain.

The case is before the Court of Appeals on an agreed statement of facts. The issues relate exclusively to the

interpretation of a written collective bargaining agreement which is before this Court. The posture of the case is, therefore, such that the Court of Appeals can resolve all aspects of the controversy. The Court should so act.

6. Conclusion.

For the reasons and upon the grounds hereinabove set forth, the conclusions and judgment of the District Court are clearly erroneous. This Court should exercise its right to correct these errors both by a declaration of the true rights of the parties under the agreement on the questions raised and a reversal of the judgment.

Respectfully submitted,

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Of Counsel:
RUSSELL & SCHUREMAN,

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

THEODORE W. RUSSELL

APPENDIX A.

Text of Article 8 and Article 9 Section 1 of Western States Area Master Freight Agreement Effective July 1, 1961 Through June 30, 1964.

ARTICLE 8. GRIEVANCE MACHINERY COMMITTEES

Section 1. Joint Area Committees

The Employers and the Union shall establish permanent joint area labor-management committees as follows: one (1) for the State of Washington and Northern Idaho; one (1) for the State of Oregon; three (3) for the States of California and Nevada; one (1) for the States of Colorado and Wyoming; one (1) for the States of Utah and Southern Idaho; one (1) for the States of Arizona and New Mexico, and El Paso, Texas, and one (1) for the State of Montana. Each such committee shall be referred to hereinafter as "Joint Area Committee." The Union and Employer committees shall consist of three (3) members and three (3) alternates. Each member may appoint an alternate in his place.

The Joint Area Committee shall at its first meeting formulate rules of procedure to govern the conduct of its proceedings. Each Joint Area Committee shall have jurisdiction over disputes and grivances involving Local Unions, or the complaints by Local Unions, arising under this Agreement or agreements supplemental hereto in the respective areas of each of the Joint Councils as set forth in the first (1st) paragraph of this Section.

Section 2. Joint Western Committee

The Employers and the Unions shall together create a permanent Joint Western Committee which shall consist of delegates from each of the areas named in Sec-

tion 1 of this Article, and this Committee shall meet at established times and at a mutually convenient location.

The Joint Western Committee shall formulate rules of procedure to govern the conduct of its proceedings as it may deem advisable.

Section 3. Function of Committees

It shall be the function of the various committees above-referred-to to settle disputes which cannot be settled between the Employer and the Local Union in accordance with the procedures established in Article 9, Section 1.

Section 4. Change of Terminals and/or Operations

Present terminals, breaking points, or domiciles shall not be transferred or changed nor shall there be any transfers of equipment between terminals which will adversely affect the employment opportunities of the employees at the terminal from which such transfer of equipment is to be made without the Employer first having asked for and received approval from the sub-committee on Change of Operations, the members of which shall be appointed by the Joint Western Committee at each regular meeting. This shall not apply within the established city cartage radius of the individual Local Union.

Section 5. Attendance

Meetings of the Joint Western and the Joint Area Committees shall be attended by each member of such committee or an alternate.

Section 6. Examination of Records

The Local Union, Joint Area Committee, or the Joint Western Committee shall have the right to examine time

sheets and any other records pertaining to the computation of compensation of any individual or individuals whose pay is in dispute.

ARTICLE 9. GRIEVANCE MACHINERY AND UNION LIABILITY

Section 1. Procedures

The Union and the Employers agree that there shall be no strike, lockout, tie-up or legal proceedings without first using all possible means of settlement, as provided for in this Agreement, of any controversy which might arise. Disputes shall be taken up between the Employer and the Local Union involved. Failing adjustment by these parties, the following procedure shall then apply:

(a) Where a Joint Area Committee by a majority vote settles a dispute, no appeal may be taken to the Joint Western Committee. Such a decision will be final and binding on both parties. Provided, however, that the Joint Western Committee shall have the right to review and reverse any decision of the area Committee and make a final decision on the case if the Joint Western Committee has reason to believe the decision was not based on the facts as presented to the Area Committee or in the possession of either party and not presented to the Area Committee; provided further, however, that such action by the Joint Western Committee may be taken only by unanimous vote.

Action by the Joint Western Committee to review a decision made by a Joint Area Committee must be taken no later than the second regular meeting of the Joint Western Committee following the rendering of the decision by the Joint Area Committee, or the right to such review and any possible reversal is waived.

(b) Where a Joint Area Committee is unable to agree or come to a decision on a case, it shall, at the request of the Union or the Employer involved, be appealed to the Joint Western Committee at the next regularly constituted session.

(c) Minutes of the Area Committee shall set forth the position and facts relied on by each party, but each party may supplement such minutes at the hearing before the Joint Western Committee.

(d) It is agreed that all matters pertaining to the interpretation of any provisions of this Agreement may be referred by the Area Secretary for the Union or the Area Secretary for the Employers at the request of either the Employers or the Unions, parties to the issue, with notice to the other Secretary, to the Joint Western Committee at any time for final decision. At the request of the Company or Union representative, the Joint Western Committee shall be convened on seventy-two (72) hours notice to handle matters so referred.

(e) All cases deadlocked in the Joint Western Committee with the exception of those provided in sub-section (f) of this Article may be submitted to umpire handling if a majority of the Joint Western Committee determines to submit such matter to an umpire for decision. Otherwise either party shall be permitted all legal or economic recourse.

(f) Any cases deadlocked in the Joint Western Committee which pertain to sub-contracting, closing of terminals, discontinuance of runs, discharge and suspension shall be submitted to umpire handling.

(g) The Impartial Umpire referred to in sub-sections (e) and (f) shall be selected on a case to case basis

by the Joint Western Committee from a list of arbitrators submitted by the San Francisco Regional Office of the Federal Mediation and Conciliation Service. Such Umpire shall be selected immediately by the Joint Western Committee upon deadlocking the case, and a hearing on the deadlocked case shall be commenced in San Francisco within three (3) days from the deadlock by the Joint Western Committee. Decisions of the Umpire shall be issued not later than ten (10) days from the close of the hearing unless the parties involved mutually agree to the contrary. The decision of the Umpire shall be specifically limited to the matter submitted to him and he shall have no authority in any manner to amend, alter or change any provision of this Agreement. The compensation of the Umpire shall be determined by the Joint Western Committee and all expenses incurred shall be borne jointly.

(h) Failure of any Joint Committee to meet without fault of the complaining side, refusal of either party to submit to or appear at the grievance procedure at any stage, or failure to comply with any final decision, withdraws the benefits of Article 9.

(i) In the event of strikes, work stoppages, or other activities which are permitted in case of deadlock, default or failure to comply with majority decisions, no interpretation of this Agreement by any tribunal shall be binding upon the Union or affect the legality or lawfulness of the strike unless the Union stipulates to be bound by such interpretation, it being the intention of the parties to resolve all questions of interpretation by mutual agreement. Nothing herein shall prevent legal proceedings by the Employer where the strike is in violation of this Agreement.

APPENDIX B.

Text of Article 6 Section 1 and Article 10 Section B(1) of the Western States Area Master Freight Agreement Effective July 1, 1961 Through June 30, 1964.

ARTICLE 6. SENIORITY

Section 1. Seniority Rights

Seniority rights for employees shall prevail under this Agreement and all agreements supplemental hereto. Seniority shall only be broken by discharge, voluntary quit, more than a two (2) year layoff or as provided in Article 5, Sections 2 and 3 of this Agreement, or any applicable provisions of the Supplemental Agreements.

B—SAVINGS CLAUSE

Pending a determination by the National Labor Relations Board that the above Article 10, A, is valid, or in the event of a determination by such Board that such Article is invalid, then pending final determination by the Court, the Union and the Employer shall comply with and enforce only the following modification thereof:

Section 1. Picket Line

It shall not be a violation of this Agreement, and it shall not be cause for discharge or disciplinary action in the event an employee refuses to enter upon any property involved in a lawful primary labor dispute, or refuses to go through or work behind any lawful primary picket line, including the lawful primary picket line of Unions party to this Agreement, and including lawful primary picket lines at the Employer's places of business.

APPENDIX C.

(A Reproduction of a Portion of the Findings of Fact and Conclusions of Law of the United States District Court. For Full Text See R.A. 314-322.)

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and the action under §301 (a) of the Labor Management Relations Act, as amended (29 U.S.C. §185 (a)) and under 28 U.S.C. §§2201, 2202.

2. Plaintiff is an employer in an industry affecting commerce, and is an "employer" within the meaning of the Labor Management Relations Act.

3. Defendants are each labor organizations representing employees in an industry affecting commerce and are each "labor organizations" within the meaning of the Labor Management Relations Act.

4. At all times during the period between July 1, 1961, and June 30, 1964, both inclusive, the Plaintiff and the Defendants were parties to a collective bargaining agreement designated as "Western States Area Master Freight Agreement" (herein called the "Master Freight Agreement") and supplements thereto covering employees of Plaintiff engaged in operations of the Plaintiff west of El Paso, Texas, who were members of the Defendant Unions.

5. Plaintiff, by the present action, seeks a determination of its rights and obligations under Articles 8 and 9 as they related to the complaints filed by the Defendants April 30, 1963.

6. With respect to said determinations sought by the Plaintiff as to the meaning and interpretation to be placed on the Master Freight Agreement, the Court concludes:

(a) Resort to the grievance procedures set forth in Article 8 and Article 9 of the Master Freight Agreement is mandatory if the dispute is one which the parties have agreed to submit to determination under grievance in the Master Freight Agreement or supplements thereto.

(b) Plaintiff was bound to submit to determination through grievance procedures the question as to whether the strike of Locals 208, 224, 357, 495 and other labor organizations called on June 11, 1962, and continued to April 1, 163, constituted a breach by said labor organization of the Master Freight Agreement.

(c) Plaintiff was not bound to submit to determination under the grievance procedures the question as to whether or not the conduct of Plaintiff, Freight Lines and J. V. Braswell in their dealings with the Southern Locals constituted unfair labor practices in violation of Sections 8 (a) (1) and (5) of the National Labor Relations Act.

(d) Whether or not Plaintiff, Freight Lines and J. V. Braswell, or any of them committed unfair labor practices in their dealings with the Southern Locals is for the National Labor Relations Board to determine.

(e) Plaintiff was not bound to submit to determination through grievance procedures the question as to whether the action of Plaintiff's former employees in joining the strike called by Defendants and others in protest of Plaintiff's asserted unfair labor practices

in its dealings with the Southern Locals was a protected activity under the provisions of the National Labor Relations Act.

(f) The phrase "to submit" found in Article 9, Section 1 (h) of the Master Freight Agreement has reference to conduct that must be followed once grievance machinery has been set in motion and the benefits of Article 9 were not withdrawn as to the complaints filed April 30, 1963, by reason of the fact that the Defendants took strike action on June 11, 1962, and thereafter through April 1 1963, without first resorting to grievance machinery for determination of the complaint which was the subject of such strike action.

7. The Court is not now required to determine and does not now determine whether an award under the grievance machinery is binding and enforceable on the parties.

8. Plaintiff's appearance before the Joint Area Committee and the Joint Western Committee constituted a special appearance and did not constitute a general appearance.

9. The complaints of Defendants filed April 30, 1963, are subject to determination pursuant to the terms and provisions of Articles 8 and 9 of the Master Freight Agreement as herein interpretated and applied.

10. Plaintiff is not entitled to a judgment as prayed for in its complaint, or otherwise.

11. Defendants are entitled to take judgment against Plaintiff for their costs or suit incurred herein.